IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.14 OF 1996

Salim Vajir Sayyad] .. Appellant
Age 26 yrs. Occu.]
Business& agriculturist]
R/0. Puri, Tal.Chandwad]
District - Nasik]

Versus.

The State of Maharashtra] .. Respondent.

Shri M.S. Mohite for the Appellant.

Mr. Gadkari APP for the State-Respondent.

CORAM : S.K.Shah, J.
DATE : July 27, 2004.
-:ORAL JUDGMMENT:-

1. By this Appeal, the original accused No.1 - Salim

Vajir Sayyed challenges the Judgment and Order passed by the 3rd Additional Sessions Judge, Nasik in Sessions Case No. 139 of 1995, whereby the Appellant - accused was convicted of the offence punishable under Sections 366-A and 363 of the Indian Penal Code and sentenced to suffer RI for three years and fine of Rs. 250/- ID to suffer RI for one month on the first count; and RI for one month and fine of Rs. 250/- ID to suffer RI for one month, on the second count. Both the accused were acquitted of the offence punishable under Section 376 of the Indian Penal Code while the aforesaid Order was passed against the appellant - accused No.1.

2. Briefly stated, the story of the prosecution was that the two accused and the minor girl - prosecutrix Taibai [PW 5] were residents of village Puri, Taluka Chandwad, District Nasik. The incident occurred on 21.10.1994. PW 1 - Chabu Mali, who is shepherd is the father and Sitabai [PW 3] is the wife of Chabu and the mother of the proscutrix Taibai. Prosecutrix Taibai was the youngest of all the daughters and was unmarried. They belong to Adivasi community.

3. Prior to the incident, the accused No.1 had made a proposal to marry Taibai, which Chibu had refused. It was alleged by the prosecution that on 21.10.1994,

Chabu, the complainant went out with his she-goats for grazing them and came back in the evening. At that time he was informed by his wife Sitabai [PW 3] that Taibai is missing since afternoon and she has not come back yet and that she is missing. Taibai was searched for but she could not be traced and, therefore, on 22.10.94, the complainant went to Vadali Bhoi police outpost and lodged missing complaint. Missing Case No. 12/1994 was registered and search of Taibai was commenced.

4. During the search and investigation, Taibai was found. Her statement came to be recorded, which discloses that on 21.10.1994 she was alone at her house. At that time the accused No.1 went to her house and asked her to accompany him. But she refused. Thereupon, it was alleged that the accused No.1 threatened to kill either her brother or herself. On that day at 11.30 a.m., the accused himself packed her clothes into a basket and he caught hold her hand and took her to Hanuman Mandir, where accused No.2 was present with motorbike. Then they left Puri. They came up to Sogras Fata abutting Bombay Agra Road. Both the accused persons halted a truck. Then they boarded the truck and came up to Chalisgaon Phata. From there they went to Chalisgaon by Bus and from Chalisgaon they went to Aurangabad by bus. From Aurangabad they went to

Janla by Bus. They stayed at Railway station Jalna. At Jalna they were intercepted by police but after sometime, they were let off. From Jalna they went to Purna by railway. From Purna they went to Hyderabad by bus and thereafter to Nandigaon. They stayed at Nandigaon for two months. The accused No. 1 took up a job in company by name 'Royal Sima', which is three kilometre away from Nandigaon. Accused No. 1 obtained a room in the factory premises. During the course of their cohabitation, it is alleged that the accused No.1 had sexual intercourse with Taibai for 7/8 occasions. Taibai expressed her desire to go back to her parents. Accused No.1 took her to Puri and they went to Police Station Vadner Bhairav, where she was medically examined and eventually the police apprehended the accused. Eventually, after completion of investigation, police filed charge-sheet in the Court of Judicial Magistrate First Class, Chandwad, who in turn committed the case to the Court of Sessions at Nasik having found that the offence was exclusively triable by the Court of Sessions.

5. The learned Additional Sessions Judge, Nasik levelled the aforesaid charges against both the accused. Both of them pleaded not guilty to the charges levelled against them. Their defence was of total denial and

that of false implication.

6. It must be noted that the accused No.1 stated that he was in love with Taibai. He denied to have induced Taibai and taken away from her house and stated that she, voluntarily, of her own accord accompanied him and then he took her to different places. He also denied to have any forcible sexual intercourse with Taibai.

7. At the trial, various witnesses were examined of which PW 1 Chabu and PW 3- Sitabai were the parents of Taibai and Taibai -PW 5 the prosecutrix; Dr. More [PW 4] who had examined Taibai.

8. On going through the evidence, the learned Additional Sessions Judge passed the aforesaid Order of conviction as against the appellant - accused No.1 for having committed offence punishable under Section 363 and 366-A of the Indian Penal Code while acquitting both the accused of the offence punishable under Section 376 of the Indian Penal Code and acquitting the accused No.2 of all the charges levelled against him.

9. I have heard the learned Counsel on behalf of the appellant - accused as also the learned Additional

Public Prosecutor.

. The learned Counsel for the appellant submitted that there would be no conviction of an offence punishable under Section 366-A of the Indian Penal Code, as seduction of Taibai was not with a view to coarse her to have illicit intercourse and/or relations with any other person. As regards the conviction under Section 363 of the Indian Penal Code is concerned, the sole evidence is that the date of birth appearing on the school leaving certificate is 1.6.78 was not substantial piece of evidence. PW 1 Chabu, the father of Taibai and Sitabai [PW 3] the mother Taibai have stated that birth date which was given by Chabu to the school authorities at the time of getting admission of Taibai in the school was from one notebook in which the birth dates of all the children were noted by Chabu - PW 1. However, Chabu - PW 1 deliberately failed to produce the primary evidence with regard to the birth date of Taibai. He also submitted that it is an admitted position that Taibai is the child born to her parents after Bhaurao, who is the youngest son of 22 years of age. He therefore submits that it is unlikely that the couple, who had seven children, would have left gap of about six years in the ages of Bhaurao and Taibai. He further submits that from the medical evidence, the age of

Taibai is considered as 18 years with margin of two years on either side. He further submits that in these circumstances, it was not possible to hold the birth date of Taibai as 1.6.78, mentioned in school record as correct birth date of Taibai and in all probabilities Taibai must have been around 18 years of age, if not more than 18 years of age. He then submitted that Taibai had taken up education up to 10th standard and was also attending classes of 11th standard from outside. Therefore, Taibai had attained the age of discretion and was capable of taking her own decisions by understanding what was bad or what was good for herself. He therefore submits that in view of the decision of the Apex Court, rendered in case of **S. Varadarajan Vs. State of Madras, reported in 1965(2) Cri. L.J. 33**, the said ratio should have been relied upon by the learned Additional Sessions Judge before whom the case was cited and should have given the benefit of the said ruling and should have acquitted the accused No.1 even of the offence punishable under Section 363 of the Indian Penal Code.

10. As against this the learned APP vehemently submitted that there is nothing to doubt the school record as per which the date of birth of Taibai was 1.6.1978 and on the date of offence, her age was 16

years four moths and 21 days. This cannot be taken to be the age of discretion and, therefore, the learned Additional Sessions Judge rightly convicted the accused.

11. I have been taken through the evidence. It is pertinent to note that the trial Court has scanned the evidence of Taibai [PW 5] and specifically observed as under :-

> " Very clearly after taking a full perusal of the evidence available on record, I make a statement that this prosecutrix was having love affairs with accused No.1 and I further say with certainty and without any doubt in my mind that the prosecutrix was the consenting party and it was more of an elopement than a forcible kidnapping."

Having made this observation, the learned Additional Sessions Judge went on to discuss the evidence with regard to the age of Taibai and having come to the conclusion that Taibai’s age was 16 years four months and 21 days at the time of incident, could not be said to have attained the age of discretion and, therefore, held that Taibai was a minor and, therefore, passed the aforesaid Order of conviction and sentence.

12. I need not elaborate on the evidence with regard to the kidnapping as the learned Trial Judge has given clear finding that there was no forcible kidnapping at all. Thus, the only point needs my consideration is whether the trial Judge was proper in arriving at a conclusion that Taibai was aged 16 years four months and 21 days at the time of incident, taking her birth date as 1.6.1978 as correct and that whether the learned Additional Sessions Judge was right in negativating the benefit to the accused No.1 on the basis of the observations of the Apex Court made in case of S. Varadrajan (Supra).

13. It is clear from the school leaving certificate that the date of birth of Taibai is mentioned as 1.6.1978. Taking that birth date, taking into consideration the date of incident, Taibai was 16 years four months and 21 days of age. There is evidence of Chabu [PW 1], Sitabai [PW 3], the parents of Taibai, who clearly stated that Chabu had maintained a diary / notebook, in which he used to write down the birth date of every child, after birth. In this behalf, there is evidence of P.W 1 Chabu and PW 3 Sitabai the father and mother of Taibai. According to these two witnesses the birth dates of all the seven children have been recorded

in the said notebook / diary. Chabu- PW 1 has admitted to have that diary with him, however, he appears to have refused to produce the same. Thus, adverse inference shall have to be drawn when the available evidence was withheld by Chabu from Court; that probably the said birth date of Taibai was not mentioned in the notebook as was disclosed in the school record. At any rate, the primary evidence as regards the birth date was the entry made in the notebook / diary and not the school leaving certificate. Therefore, it was wrong on the part of the learned Additional Sessions Judge to have relied on the evidence of school record.

14. From the medical evidence, i.e. the evidence of Dr. More, it is seen that he had carried out necessary tests for ascertaining the age of Taibai and had arrived at a conclusion that her age was 18 years with margin of about two years on either side. These circumstances do indicate that the date of birth given in the school leaving certificate could not have been relied on. It is also a common knowledge that while taking admissions in the school, particularly of girls in villages, they are taken at late age and while giving the birth date, they show the incorrect birth dates with view to get the admission.

15. Taking overall view of the matter, therefore, it is clear that the birth date given in the school record as 1.6.1978 was not correct at all. There is cogent reason for this. Chabu - PW 1 has clearly admitted in his evidence that Bhaurao is next elder to Taibai. That means Taibai was born immediately after Bhaurao. He further stated that Bhaurao is 22 years of age. If the birth date in the school register 1.6.1978, is taken to be the correct birth date, then the age of Taibai becomes 16.1/2 years showing that there was more than 5.1/2 years gap between these two children, namely, Bhaurao and Taibai as Taibai was borne next to Bhaurao. This also appears to be most improbable for the couple who had seven children surviving, one or two seems to have expired. The age given by Dr. More appears to be closer to the true age of Taibai, taking into consideration the age of Bhaurao, which is 22 years.

16. Considering all these aspects, I have no hesitation to hold that the age of Taibai at the time of incident must be somewhere more than 17 years, if not 18 years.

17. The Apex Court in the aforesaid case of S. Varadarajan has taken a view that though the child is not of the tender age and has been on threshhold of

attaining majority and was capable of understanding what was true and good and what was bad for her, then, there must be some more evidence than merely taking her away from proper guardianship. There must be evidence to show that she was induced on one pretext or the other to accompany the accused persons. Otherwise, eventhough she is minor it need not be a case covered under Section 363 of the Indian Penal Code.

18. In my view, the learned Additional Sessions Judge should have considered all these aspects and should have given benefit of these facts to the accused No.1. It is obvious that Taibai was having knowledge of attaining majority i.e. completing 18 years of age. What is material is that she must be capable of knowing what was good and what was bad for her. She must be capable of taking her own decisions, which was in her own interest. She must have attained the age of discretion. In the present case, Taibai had taken education up to 10th standard in village. She also attended the 11th standard classes, though from outside. What is important to be noted is that she had left the house of her parents on her own accord and that therefore it was definitely not a case of kidnapping. She was in love with accused No.1 as could be seen from the above observations of the learned Additional Sessions Judge.

All these circumstances clearly indicate that she had attained the age of discretion. She was knowing as to what was good or bad for her. She voluntarily went with the accused No.1. from place to place and voluntarily lived at Nandigaon for about two months, in a room hired by accused No.1 in the factory because the accused No.1 had taken a job in the factory. What is still pertinent to note is that the accused No.1 reached her back to her village just when she expressed her desire to go to her parents house. All this evidence appears to have been overlooked by the learned Additional sessions Judge and probably the learned Additional Sessions Judge was swayed away with the age of 16years four months and 21 days, which was much away from the age of majority i.e. 18 years. This view is definitely erroneous.

19. Under these circumstance, the larned Additional Sessions Judge committed error in holding the accused No.1 guilty of the offence punishable under Section 363 of the Indian Penal Code. The conviction and sentence on that could, therefore, shall have to be set aside.

20. So far as the offence punishable under Section 366-A of the Indian Penal Code is concerned it is apparent that the accused No.1 had taken Taibai with him. There is nothing to satisfy the ingredients of

Section 366-A of the I.P.C. viz. whoever, by any means whatsoever induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be forced or seduced to illicit intercourse with another person. So far as this another person is concerned, the evidence is totally absent. So far as the accused No.1 is concerned he is acquitted of the offence under Section 376 of the Indian Penal Code. There is no evidence to indicate that the accused No.1, had taken Taibai with him for the purpose of having sexual intercourse with her or for others.

21. Under these circumstance, the conviction and sentence passed against the appellant - accused on both these counts is erroneous and shall have to be set aside. Hence, the Order :-

ORDER

1. The appeal is allowed.

2. The Order of conviction and sentence passed against the appellant -accused No.1 for the offence punishable under Sections 363 and 366-A of the Indian Penal Code, is hereby set aside. The appellant - accused No.1 is acquitted of both these charges levelled

against him. His bail bond shall stand cancelled.

3. The fine amount, if paid shall be refunded to the appellant - accused No.1.

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[S.K.Shah, J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 14 OF 1996

Date of Decision : JULY 27, 2004.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copyof the Judgment should be sent to Nagpur, Goa and Aurangabad office?

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Salim Vajir Sayyad] .. Appellant
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Shri M.S. Mohite for the Appellant.
Mr. Gadkari APP for the State-Respondent.
CORAM : S.K.Shah, J.
DATE : July 27, 2004.

P.C.:-

1. For the reasons separtely recorded in the Judgment,

the following Order is passed :-

ORDER

1. The appeal is allowed.

2. The Order of conviction and sentence passed against the appellant -accused No.1 for the offence punishable under SectionS 363 and 366-A of the Indian Penal Code, is hereby set aside. The appellant - accused No.1 is acquitted of both these charges levelled against him. His bail bond shall stand cancelled.

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[S.K.Shah, J.]